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In the Supreme Court of the United States

October Term, 1976

No. 75-1672

IRVIN E. GUSTAFSON, individually and on behalf of all others similarly situated, and as next friend of CAROL GUSTAFSON, *Appellants,*

vs.

LINUS HOFFMAN and WALTER SPENCER, d/b/a ORBIT AUTOMOTIVE, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

BRIEF AMICUS CURIAE ON BEHALF LINUS HOFFMAN, *ET AL.*, URGING DISMISSAL OR AFFIRMANCE

PAULL MINES
P. O. Box 1769
Albuquerque, New Mexico 87103
Attorney for Amicus Curiae
New Mexico Automotive
Dealers Association

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BRIEF AMICUS CURIAE ON BEHALF LINUS HOFFMAN, *ET AL.,* URGING DISMISSAL OR AFFIRMANCE

INTEREST OF THE NEW MEXICO AUTOMOTIVE DEALERS ASSOCIATION

The New Mexico Automotive Dealers Association is a non-profit unincorporated trade association organized under the laws of the State of New Mexico and comprised of ap-

proximately 140 new car franchised dealers throughout the State of New Mexico.

The Association is dedicated to the betterment of the automotive industry in the State of New Mexico through lawful concerted action, and in that regard has participated in several law cases where the interests of the automotive industry were at stake, including the case at bar at the District Court level.

As most members of the Association are as a part of their businesses engaged in the repair and maintenance of automobiles, the issues raised by this appeal are of concern to the Association. In view of the Court's request that the Appellees respond to the Appellants' Jurisdictional Statement and Appellees' apparent financial inability fully to support such effort, the Association in an attempt to assist the Court in resolving the issues raised by this Appeal have filed this brief with consent of the parties.

QUESTIONS PRESENTED

Your Amicus respectfully submits the following three questions are a more appropriate statement of the issues raised by this appeal:

1. Does the United States Supreme Court have appellate jurisdiction of an appeal from the decision of a three judge court where no state official remains as a party defendant in the action?

2. Does a private garageman's retention of an automobile as security for an unpaid repair bill under a state statutory lien constitute state action which is in violation of the Fourteenth Amendment of the United States Constitution?

3. Does a private garageman's election to sell an automobile against which a garageman's lien is held by public auction and actual sale of the automobile by public auction after due notice and alleged default on the underlying debt similarly constitute state action which is in violation of the Fourteenth Amendment of the United States Constitution?

ARGUMENT

I.

THE APPEAL SHOULD BE DISMISSED WITHOUT DIRECTION FOR ENTRY OF A NEW JUDGMENT BELOW, BECAUSE, AS IS READILY DISCERNIBLE FROM THIS COURT'S PRIOR DECISIONS, JURISDICTION IS NOT PRESENT UNDER 28 U.S.C. §1253.

The appellate jurisdiction of this Court in this matter, if any, rests entirely upon 28 U.S.C. §1253. A necessary predicate to jurisdiction under 28 U.S.C. §1253 is that this suit must be a matter which was "required by any Act of Congress to be heard and determined by a district court of three judges." As Appellants readily admit (Jurisdictional Statement, pp. 8-9), one requirement for invoking three judge court jurisdiction is the presence of a state officer as a party defendant. 28 U.S.C. §2281; *Moody v. Flowers*, 387 U.S. 97 (1967). As this case now stands, no such defendant is present.

Although the absence of the Bernalillo County Magistrates as party defendants in this matter initially arose from the Magistrates' motion to dismiss, it must also be pointed out that the Appellants subsequently ratified that dismissal. Ratification occurred because subsequently and quite in-

explicably Appellants voluntarily moved to dismiss the Magistrates as party defendants. (Appellants' Motion, filed August 22, 1974). Appellants may have so moved in belated recognition of the applicability of *O'Shea v. Littleton,* 414 U.S. 488 (1974), since Appellants' Complaint did not contain even the remotest suggestion that Appellants were threatened with prosecution under §61-3-2.1, N.M. Stat. Ann. The lower court correctly ruled that Appellants' Motion was moot. (Order, filed August 29, 1974).

Thus, the only remaining possibility of a state officer as party defendant was the New Mexico State Commissioner of Motor Vehicles whom Appellants sought to join as an additional party defendant under Rules 15 and 21, F.R.Civ.P. The lower court's adverse ruling on Appellants' Motion to join the Commissioner of Motor Vehicles was a decision which is left to the ruling court's sound discretion. 3A J. Moore, Federal Practice ¶21.04[1], at 21-17 - 21-18 (2d ed. 1974). Although absence of a state officer as party defendant prevented Appellants from seeking injunctive relief against a state official, such absence in this case did not divest the district court of jurisdiction on Appellants' central claim that the statutes in question were unconstitutional. Indeed, even if the Commissioner of Motor Vehicles had been named a party defendant, his status would have been close to being nominal. *See Wilentz v. Sovereign Camp,* 306 U.S. 573, 579-580 (1939).

Without a state official as a party defendant it was not necessary to continue the convention of the three judge Court, and no direct appeal lies to this Court. *Perez v. Ledesma,* 401 U.S. 82 (1971).

On numerous prior occasions it has been stated if a three judge court is not required, no appeal will lie to this Court. *Gonzales v. Automatic Employees Credit Union,* 419

U.S. 90 (1974); *Board of Regents v. New Left Education Project,* 404 U.S. 541 (1972); *Perez v. Ledesma,* 401 U.S. 82 (1971); *Mitchell v. Donovan,* 398 U.S. 427 (1970) *(per curiam)*; *Moody v. Flowers,* 387 U.S. 97 (1967). This Court has further warned that the Court's appellate jurisdiction under 28 U.S.C. §1253 will be narrowly construed. *E.g., Hagans v. Lavine,* 415 U.S. 528 (1974).

Even if the order from which the appeal is taken has been issued by an unnecessarily convened three judge court, appellate jurisdiction in this Court is not established. *Gonzales v. Automatic Employees Credit Union,* 419 U.S. 90 (1974); *Board of Regents v. New Left Education Project,* 404 U.S. 541 (1972); *Mitchell v. Donovan,* 398 U.S. 427 (1970) *(per curiam).* Contrary to Appellants' apparent suggestion (Jurisdictional Statement, p. 9), a decision of an unnecessarily convened three judge court is not jurisdictionally tainted but rather treated as if entered by a single judge court. *See Perez v. Ledesma,* 401 U.S. 82, 86 (1971); *Gonzales v. Automatic Employees Credit Union,* 419 U.S. 90 (1974); *Moody v. Flowers,* 387 U.S. 97 (1967). Use of the three judge court in this matter was probably a conservative attempt to avoid nullification of the proceedings should any appellate court subsequently determine a three judge court decision was actually necessary.

Your Amicus respectfully urges this Court not to continue its practice of grace in directing that a fresh judgment be entered in this matter to allow a further appeal. While there may be areas of confusion on some aspects of this Court's appellate jurisdiction over three judge court matters, clear and understandable precedent was available from which Appellants should have determined the proper method of appeal. Prominent warnings were readily accessible. 9 J. Moore, Federal Practice ¶110.03[3], at 83 (2d ed. 1975).

To grant Appellants additional opportunity to appeal will apparently tax Appellees financially. Further, in view of Appellants' continued contention that the repairs were unauthorized (Jurisdictional Statement, p. 3), this Court should save Appellees time and expense of having to point out to the Court of Appeals that the lien is not even in issue because §61-3-1, N.M. Stat. Ann., requires that repairs be authorized before a lien may attach.

As a final matter, dilemma and confusion regarding the status of three judge court law in the District of New Mexico should not cause substantial concern. It seems reasonably assured that three judge court jurisdiction will be severely limited by S. 537, 94th Cong., 1st Sess., which at the time of writing this brief had passed both houses of Congress but had not yet been signed by the President.

II.

IN THE ALTERNATIVE, THE DECISION OF THE LOWER COURT SHOULD BE SUMMARILY AFFIRMED.

A. *The Complained Conduct Does Not Constitute State Action.*

For Appellants to prevail on their claim under the Fourteenth Amendment they must establish that the complained conduct constitutes state action. *The Civil Rights Cases,* 109 U.S. 3 (1883).

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), requires careful application of the tests for state action. State action does not exist merely because the Defendant receives some state benefit or is subject to some state regulation.

Moose Lodge, supra at 173; *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974).

Neither of the two tests of state action in issue here (Jurisdictional Statement, pp. 5-6) are satisfied in this case. The operation of the New Mexico lien statutes do not involve direct acts of state officials or closely associate any acts of state officials with the alleged deprivation of rights as found in *Fuentes v. Shevin,* 407 U.S. 67, *reh. denied,* 409 U.S. 902 (1972); *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970); *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Young v. Harder,* 361 F.Supp. 64 (D. Kan. 1973). In contrast, a garageman's retention of a vehicle is a voluntary and independent act, without any action by state officials.

If a garageman does thereafter elect to foreclose the lien by giving notice and subsequently selling the vehicle by public auction, he is the one who accomplishes those acts. The Department of Motor Vehicles' involvement in transferring title is a mere record-keeping activity. Such *de minimis* involvement hardly rises to the level of state action. *Parks v. "Mr. Ford",* 386 F.Supp. 1251 (E.D.Pa. 1974, 1975); *cf., Adams v. Southern California First National Bank,* 492 F.2d 324 (9th Cir. 1973, 1974) (as modified on denial of rehearing), *cert. denied,* 419 U.S. 1006 (1974). This Court observed in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974), "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."

Nor can it be established that the New Mexico lien statute commands or authorizes an individual to act in a normally public function as found in *Adickes v. S. H. Kress*

& Co., 398 U.S. 144 (1970), and *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970). Retention of an automobile as security for an unpaid repair debt under a statutory lien which is declarative of the common law, R. BROWN, PERSONAL PROPERTY §13.2, at 396 (3d ed. 1975), can hardly be characterized as commanding or authorizing a private individual to act in a traditionally public function. Early innkeeper lien cases finding state action on this alter ego theory have been criticized. *Phillips v. Money*, 503 F.2d 990, 993 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975); *Parks v. "Mr. Ford"*, 386 F.Supp. 1251, 1260-1262 (E.D.Pa. 1974, 1975); *Anastasia v. Cosmopolitan National Bank of Chicago*, 527 F.2d 150, 157 (7th Cir. 1975), *cert. denied*, ... U.S. ...., 96 S. Ct. 1143 (1976); *Davis v. Richmond*, 512 F.2d 201 (1st Cir. 1975).

While admittedly a small collection of trial court decisions striking down garageman liens or their enforcement by sale does exist, none of these decisions with the possible exception of *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378 (2d Cir. 1973), have been issued by the Courts of Appeals. It would appear from the analogous situation involving repossessions under the Uniform Commercial Code that given the opportunity the Courts of Appeals would find no state action present. *Shirley v. State National Bank*, 493 F.2d 739 (2nd Cir.), *cert. denied*, 419 U.S. 1009 (1974); *Gibbs v. Titelman*, 502 F.2d 1107 (3rd Cir.), *cert. denied*, 419 U.S. 1039 (1974); *Brantley v. Union Bank & Trust Co.*, 498 F.2d 365 (5th Cir.) *(per curiam), cert. denied*, 419 U.S. 1034 (1974); *Turner v. Impala Motors*, 503 F.2d 607 (6th Cir. 1974); *Nowlin v. Professional Auto Sales, Inc.*, 496 F.2d 16 (8th Cir.), *cert. denied*, 419 U.S. 1006 (1974); *Adams v. Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973, 1974) (as modified on denial of rehearing), *cert. denied*, 419 U.S. 1006 (1974). The state's involvement in transfer of title after such a repossession is as "pervasive" as the garageman lien situation. *E.g., Kirksey v. Theilig*, 351 F.Supp. 727 (D. Colo. 1972).

B. *Even If State Action Is Present, The Lien Statutes Are Not Unconstitutional On Their Face Or In Operation.*

The teaching of *Mitchell v. W. T. Grant Company*, 416 U.S. 600 (1974), is that no absolute requirement of notice and hearing exists prior to prejudgment deprivation of property. Before such a requirement is to be imposed, the debtor's interest must outweigh the interests of the creditor. Balancing these interests in the context of the New Mexico garagemen's lien statute indicates no notice or hearing requirement should be imposed.

First, no dispossession takes place. Indeed, the lien cannot attach unless there was a consensual transfer. §61-3-1, N.M. Stat. Ann. New Mexico law does not even permit dispossession. *Mathieu v. Roberts*, 31 N.M. 469, 247 P. 1066 (1926).

The absence of a dispossession in the garagemen's lien cases has been frequently cited as justification for not imposing a notice and hearing requirement. *Phillips v. Money*, 503 F.2d 990, 994-995 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975); *Adams v. Department of Motor Vehicles*, 11 Cal. 3d 146, 113 Cal. Rptr. 145, 520 P.2d 961 (1974). Similarly, the absence of dispossession in the analogous warehousemen's lien situation has been considered dispositive. *Magro v. Lentini Bros. Moving & Storage Co.*, 338 F.Supp. 464 (E.D.N.Y. 1971).

Second, the creditor-garageman has not contemplated extending credit to the car owner and has not therefore taken those precautions which would normally accompany a

credit transaction. In a true sense, therefore, the garageman through his repairs acquires a substantial property interest in the automobile.

Elimination of the garageman's lien would dispossess the garageman, change the *status quo* and frustrate the expectations of the parties to the repair transaction. *Phillips v. Money,* 503 F.2d 990, 994-995 (7th Cir. 1974), *cert. denied,* 420 U.S. 934 (1975). Elimination of the garagemen's lien forces the garageman to assume a new risk. In contrast, in the *Fuentes v. Shevin,* 407 U.S. 67, *reh. denied,* 409 U.S. 902 (1972), type of transaction this risk has already been assumed by the creditor.

Third, where a garageman has gained a substantial property interest, the availability of alternative remedies to the automobile owner should under the balancing test of *Mitchell v. W. T. Grant Company,* 416 U.S. 600 (1974), be deemed adequate. These remedies include an action for replevin or conversion.

CONCLUSION

For the foregoing reasons, the New Mexico Automotive Dealers Association respectfully urges this Court to dismiss the appeal without direction for entry of a fresh judgment below or, in the alternative, summarily to affirm the judgment below.

PAULL MINES
P. O. Box 1769
Albuquerque, New Mexico 87103
Attorney for New Mexico
Automotive Dealers Association,
Amicus Curiae

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